

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

CARRIAGE INN OF COLUMBUS NURSING AND
REHABILITATION CENTER, INC., D/B/A
GOOD SHEPHERD COMMUNITY NURSING CENTER

Employer ^{1/}

and

Case 9-RC-17667

SEIU/DISTRICT 1199 WV/KY/OH, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

The Employer, Good Shepherd Community Nursing Center, (Good Shepherd) operates a skilled- care nursing home located in Columbus, Ohio. The Petitioner, SEIU/District 1199 WV/KY/OH, AFL-CIO, on June 21, 2002, filed a petition with the National Labor Relations Board (Board) under Section 9(c) of the National Labor Relations Act (Act) seeking to represent a unit of service and maintenance employees employed by the Employer at its Good Shepherd facility. A hearing officer conducted a hearing on July 1 and the parties filed briefs with me.

The primary issue before me is whether the petition should be dismissed due to the anticipated closure of the Good Shepherd facility. The Employer argues that the closure of Good Shepherd is certain and imminent, and, therefore, holding an election would serve no useful purpose. The Petitioner contends that an election should be granted asserting that the closing date is neither certain nor imminent. It also argues that the Employer is merely relocating to a new facility, known as Scioto Retirement Community, Inc., (Scioto) and that the employees of Good Shepherd will represent a substantial and representative complement of the employees employed at the new facility. The Employer, on the other hand, contends that this is not a relocation but, rather, Scioto is a distinct employing entity and that, in any event, the employees of the petitioned for unit will not constitute a substantial and representative segment of the employees employed at Scioto. I have fully considered the record evidence, the parties' briefs, and relevant case law and I have decided to direct an election.

I will initially present a brief overview of Good Shepherd and Scioto. Thereafter, I will present my reasoning for viewing this case as an anticipated closure rather than a relocation and set forth the facts and reasoning in support of my conclusion to hold an election. Finally, I will define the unit and determine those eligible to vote and the obligations and rights of the parties surrounding this direction of election.

^{1/} The Employer's name appears as amended by its post hearing brief.

Overview of the Operations of the Employer and Scioto:

The Employer operates a skilled nursing facility in a two story facility at 2120 E. Fifth Avenue, in Columbus, Ohio. Good Shepherd uses one floor for its skilled nursing operations. The other floor is leased by a third party. Good Shepherd is authorized for 93 beds but currently 43 of the beds are shelved.^{2/} There are currently 36 residents at Good Shepherd. Administrator Christa King is responsible for the overall operations of the nursing home. Reporting directly to King are: Director of Nursing, Director of Medical Records/Central Supply, Director of Environmental Services, Interim Director of Dining, Laundry Supervisor, Residential Care Coordinator, the Diet Technician and the Payroll office person.

The Scioto facility is currently under construction at 433 Obetz Road in Columbus, Ohio, which is about 12 to 15 miles from Good Shepherd. It is expected that this facility will hold a 93 bed skilled nursing facility, which will include a dementia unit; a 64 bed assisted living unit; approximately 34 condominiums for independent living and an inpatient, outpatient therapy unit. Christa King will become the executive director of Scioto. The record does not disclose the remaining managerial and supervisory positions at Scioto or who will occupy those positions.

Good Shepherd and Scioto are separate corporations. However, NF Holdings, Inc., holds all shares of Good Shepherd and Scioto. NF Holdings, Inc. is owned by MHS Holdings which, in turn, is owned by two shareholders, Robert and Lynn Huff. MHS Holdings owns other corporations, including Multi-Health Services, Inc., which is presided over by President Robert Huff. Multi-Health Services manages Good Shepherd and will manage Scioto.

There is Insufficient Evidence to Establish this is a Relocation or that Present Employees will Constitute a Substantial and Representative Complement of Employees Employed at Scioto:

The Employer, contrary to the Union, claims that Good Shepherd and Scioto are separate employing entities and that the opening of Scioto is not a relocation. Moreover, it argues that the petitioned for unit will not represent a substantial and representative portion of the unit at Scioto.

In the context of an expected relocation by an employer, the Board will generally direct an election if the petitioned for unit is “substantial and representative” of the work force to be employed at the new facility. The Board finds the current unit employees to be a substantial and representative complement when these employees constitute about 30 percent of the eventual employee complement in 50 percent of the anticipated job classifications. *Yellowstone International Mailing, Inc.*, 332 NLRB No. 35 (2000).

^{2/} Due to declining census these 43 beds were put out of service.

I find that, despite evidence of common ownership, there is not enough evidence on the record to conclude that the circumstances here constitute a relocation by a single employer.^{3/} In this connection, I find that there was insufficient evidence showing who will possess active and actual control over the day-to-day operations and/or labor relations at Scioto.^{4/} Moreover, based on the record, it would be purely speculative to determine whether the petitioned for unit at Good Shepherd will constitute a substantial and representative complement of the employees at Scioto.

King testified that there could potentially be in excess of 100 service and maintenance employees at Scioto, depending on the census, and that the employees of Good Shepherd will have to apply at Scioto to gain employment. Mr. Huff has given the impression to employees that, if they were in good standing at Good Shepherd, they would be hired at Scioto. However, there is no evidence indicating the number of employees who would likely accept employment at Scioto, which is 12 to 15 miles away from Good Shepherd. Thus, even if the eventual workforce is not as large as the Employer anticipates, without more information concerning the number of employees who will seek employment at Scioto, I cannot find the employees at Good Shepherd will constitute a substantial and representative segment of the employees employed at Scioto. See, *Cooper International, Inc.*, 205 NLRB 1057 (1973) (Board refused to speculate whether unit will be a substantial and representative portion of eventual unit in absence of evidence that a considerable proportion of the unit would accept offers at the new facility.) Based on the foregoing, I have analyzed this case as a plant closure.

Good Shepherd is Certainly Closing but the Closing is not Imminent:

In deciding whether an election should be conducted in the context of an anticipated closing, the Board considers the certainty and imminence of the cessation of operations. If the cessation of operations is both certain and imminent, such that holding an election serves no useful purpose, dismissing the petition is warranted. I have concluded that it is certain that Good Shepherd will close, but the closing is not imminent. Thus, holding an election can serve a useful purpose.

The record discloses that once Scioto is operating a skilled nursing unit, and all residents of Good Shepherd have been placed at Scioto, or at another nursing home, Good Shepherd will close. In this connection, the record reflects that a document called a certificate of need, issued by the State of Ohio, authorizes a skilled nursing facility to operate a certain number of beds. According to the Employer, the certificate of need for Good Shepherd has been approved for transfer to Scioto. A single certificate of need can only be used for one facility and there is presently a state mandated moratorium on the issuance of certificates of need. Thus, once the

^{3/} The Union submitted documents which seem to reflect that Good Shepherd and Scioto at one point had the same charter number. Additionally, it supplied a document purported to be a certificate of need, in which "Carriage Inn of Columbus Nursing and Rehabilitation Center d/b/a/ Scioto Retirement Community" is listed throughout the document and which reflects that Scioto is a replacement for Good Shepherd. The claimed certificate of need was not signed and portions of the document were not submitted. I am not confident about the document's reliability. Moreover, the import of these documents was not fully articulated on the record. Without more explanation concerning the relevancy of these documents, I can not rely on them to conclude that Good Shepherd and Scioto are one in the same.

^{4/} See, *Dow Chemical Company*, 326 NLRB 288 (1998).

Good Shepherd certificate of need is, in fact, transferred to Scioto, that certificate of need can no longer be used by Good Shepherd and Good Shepherd will close.

The date of that closing, however, is uncertain. The Employer presented testimony concerning the process and the projected length of time it will take for Scioto to become operational. Initially, the construction contractors have to erect the building. According to the Employer's witnesses, construction is ahead of schedule and, therefore, it anticipates that the building will be erected by December 1.^{5/}

Once construction is complete, and an occupancy permit is granted, the Employer will place two fee residents in the facility for Medicare/Medicaid certification purposes. Thereafter, the Ohio Department of Health conducts a licensure survey for the residential and skilled nursing units, which the Employer estimates, will occur within 2 to 4 weeks from occupancy. If all goes well with the licensure survey, the Department of Health will start a Medicaid, Medicare certification process. According to the Employer, this process should be done within a week. Once this entire process is finished, the residents from Good Shepherd may transfer to Scioto.^{6/}

At some point, the Certificate of Need is actually transferred from Good Shepherd to Scioto, which involves the Employer submitting paperwork to the State and the State's approval of the actual transfer. It is unclear from the record when this will happen or how long this process generally takes.

Peter Merritt, Vice-President of Operations for Multi-Health Services, testified that the earliest that Good Shepherd will close is mid-December and the latest that it will close is February 28. Based on the record and the Employer's brief, it appears that February 28 is actually the date by which Phase 1 must be built.^{7/} Certainly, construction and the accompanying occupancy permit are preconditions to the licensing and certification process, described above. Thus, if the Scioto is not built until February 28, the earliest Good Shepherd will close is mid-March or early April.

The Employer hopes to reduce its census from 36 to 30 by about August 1 and, to thereafter, gradually reduce the census to those residents interested in moving to Scioto. With this reduction in census to 30 residents, the Employer's "best guess estimate" is that it would lay off about 25 percent of the petitioned for unit on about August 1. In this regard, the Employer explained that the state mandates a minimum of one direct care worker for every 15 patients per shift. Thus, once the census declines to 30 residents the Employer could lay off off 3 state tested nursing assistants and lay off a few other service employees.

^{5/} Based a review of the record, and Employer's brief, it appears the Employer expects phase 1 of the construction project, including the skilled nursing facility, assisted living unit and therapy departments, to be constructed by December 1. Phase 2, construction of the condominiums, will be completed at a later, unspecified date.

^{6/} Peter Merritt, Vice-President of Operations for Multi-Health Services, testified that this time line is accurate based on his experience at other locations. No detail was provided regarding these prior experiences.

^{7/} Merritt testified that the latest date that Good Shepherd will close is February 28, "based on the construction agreement." The Employer, in its post hearing brief, clarified that, "under the construction agreement, the maximum allowable date for completion of the Phase 1 facilities is February 28, 2003." This construction agreement is not in evidence, and there was no testimony explaining the consequences if phase 1 is not built by the February 28 date.

The record fails to show whether future events will match the Employer's census goal. There is testimony that the census has declined steadily over the past 5 years. However, there is no evidence showing the rate of that decline, or evidence supporting the belief that the Employer will lose six patients by August 1, only 1 month from the hearing date. Because of state requirements, as long as there are in excess of 30 residents the Employer will maintain its level of state tested nursing assistants.

The Employer has not notified its employees of any anticipated layoffs. Further, it appears that there are no definite plans of employee layoffs after August 1 and before the facility closes.

The Board has consistently made clear that mere speculation as to the uncertainty of an employer's future operation will not serve to dismiss an election petition. *Hazard Express, Inc.*, 324 NLRB 989, 990 (1997). However, when the evidence establishes that a plant closure or permanent layoff is both certain *and* imminent it will dismiss the petition. *Hughes Aircraft Company*, 308 NLRB 82 (1992); *Larson Plywood Company, Inc.*, 223 NLRB 1161 (1976). The Board has never defined imminence by a particular time period. The Board has made clear imminence is when closure or permanent layoffs is so near in time that holding an election serves no useful purpose. As part of this analysis, the Board also considers unit contraction and whether a substantial portion of the petitioned for unit will remain employed until closure. *Plum Creek Lumber*, 214 NLRB 619 (1974).

In *General Electric Company*, 101 NLRB 1341 (1952), the employer argued for dismissal of the petition on grounds that it would be ceasing production beginning in the first quarter of the year, necessitating layoffs - with a complete cessation of operations by mid-August of that year. The Board directed an election although the plant would be closed in approximately 7 to 8 months. In so doing, the Board noted that "*the cessation of operations will continue over an extended period of time*," and that, "*a substantial and representative number will continue to be employed for a major portion of the termination period*." *Id* at 1344.

Similarly, in *Gibson Electric, Inc.*, 226 NLRB 1063 (1976), the Board ordered an election finding that a substantial portion of the workforce will be employed long enough to warrant an election. At the time the Board decision issued, there was as few as 2, and as many as 5 months, of work remaining. In *E.I. du Pont de Nemours and Company*, 117 NLRB 1048 (1957), the Board again directed an election where only approximately 5 months remained before operations ceased.

Here, a substantial portion of the unit will be employed for an extended period of time. The record reflects that the facility will remain open, with a substantial and representative portion of the work force, for, at the very least, another 5 months and, quite possibly, for 6 months or longer.

Any projection that Good Shepherd will close by the Employer's earliest projected date necessitates no delays in construction. It also requires that the State commence and complete a licensure survey; that the license is granted without incident; that the State commence and complete a Medicare and Medicaid certification; and that this certification is granted without incident; that the certificate of need is implemented at Scioto and residents from Good Shepherd are transferred to Scioto - within 3 weeks.

Based on these many conditions that must be met before Scioto can open and Good Shepherd can close - conditions beyond the Employer's control – it is very possible that Good Shepherd will remain open well beyond 5 months.

I believe that the months that Good Shepherd will remain open provides sufficient time for the Board to conduct an election, and, if the employees so choose, enough time for meaningful bargaining between the Petitioner and the Employer.

The Employer, in its brief, cited *M.B. Kahn Construction Co., Inc.*, 210 NLRB 1050 (1974), for its proposition that the closure is imminent. In that case, at the time the decision issued 5 months of work remained on the project. However, the employer in *M.B. Kahn* planned to lay off approximately 80 percent of its employees in one bargaining unit, and 50 to 75 percent of the employees in another unit, in less than 3 months from the issuance of the decision. Such a dramatic and expeditious reduction in the workforce certainly makes an election less useful. In the present case, the record indicates that a majority of the petitioned for unit will remain employed until Good Shepherd closes.

The Employer further cites *NLRB v. Spring Arbor Distribution Company*, 59 F.3d 600 (6th Cir. 1995) in which the Court held the Board had erred by concluding that the employer's pending layoffs were speculative. Here, I am not finding that the closure is speculative. Rather, I have concluded that there is a strong possibility the facility will remain open beyond the Employer's earliest projected date, and, further, in the instant matter, that 5 months is sufficient time to make an election serve a useful purpose.

I am cognizant that Board law has consistently held that there is no useful purpose in holding an election when only 4 months of work remain. See, *Engineers Constructors, Inc.*, 756 F.2d 464 (6th Cir. 1985). However, in this case, there is no evidence that Good Shepherd will close within 4 months. Moreover, the date Good Shepherd will close is undeniably uncertain. At a very minimum, the Employer will remain open for 5 months, with a substantial and representative complement of its work force. Additionally, there is a strong possibility that Good Shepherd will stay open significantly longer than 5 months, particularly because several of the critical conditions which must precede the closing are beyond the control of the Employer. Given these factors, and based upon the case authority cited above in which elections were directed in like circumstances, I find it would undermine the purposes of the Act to deprive employees of the right to vote and bargain collectively, and I find that there is sufficient time for voting and bargaining to serve a useful purpose.

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction.
3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time service and maintenance employees employed by the Employer at its 2120 E. Fifth Avenue, Columbus, Ohio facility, including, state tested nursing assistants, restorative aides/technicians, nursing aides, activity assistants, cooks, dietary employees, dietary aides, housekeeping employees, laundry employees, and floor technicians, but excluding all registered nurses, licensed practical nurses, office clerical employees, and all professional employees, guards and supervisors as defined by the Act.^{8/}

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **SEIU/District 1199 WV/KY/OH, AFL-CIO**. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. Voting Eligibility:

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retained their status as such during the eligibility period, and the replacements of those economic strikers. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters:

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior*

^{8/} It appears that each included classification might not exist, but, in any event, I note that each classification is a standard service and maintenance classification.

Underwear, Inc., 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 23, 2002**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations:

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099-14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDT on **July 30, 2002**. The request may **not** be filed by facsimile.

Dated: July 16, 2002

Richard L. Ahearn, Regional Director
National Labor Relations Board
Region 9

Classification Index

347-8020-6000